No. 11527

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC STATES CORPORATION, a corporation,

Appellant,

vs.

FRANK D. HALL, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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Statement of the Issues Involved.

Point I. The total amount of lien and encumbrance of the appellant on the property on December 9, 1942, was $45,000.00, plus 7% interest thereon compounded quarterly, including interest on the unpaid interest thereon from July 30, 1927, to December 9, 1942, less all sums paid on account thereof.

Point II. The appellant being a secured creditor and being the sole creditor and the estate being ample to pay the entire claim, as well as interest from and after the filing of the petition, equity requires the payment of interest from and after filing said petition to the appellant.

Point III. The judgment in the case of *Hall v. Citizens National Bank*, 53 Cal. App. (2) 625, is *res judicata* that the obligation of appellees was valid and existing under the declaration of trust and the deed of trust on November 4, 1940, and that the appellant had not waived and was not estopped from enforcing the same.

Point IV. There is no evidence of a waiver or estoppel with respect to payment of principal or interest sufficient to sustain the judgment of the lower court.

Point V. Appellees do not have a sufficient interest in the real property in question to maintain the instant proceedings under section 75.

Point VI. The determination of the validity and amount of appellant's secured claim, including interest up to December 9, 1942, is a matter of right and not a matter of judicial discretion.

A. Even if the allowance of interest up to December 9, 1942, herein be a matter of judicial discretion, there was an abuse of such discretion by the failure to allow interest in accordance with the provisions of the obligation from its inception to December 9, 1942.

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APPELLANT'S OPENING BRIEF.

Statement of the Case.

On December 9, 1942, appellees filed an original Petition for Farmer-debtor Relief under Section 75 of the Bankruptcy Act. [Tr. pp. 2-3.]

On April 2, 1943, appellees filed a Composition and Extension Proposal. [Tr. pp. 73-75.]

On April 15, 1943, appellant filed a rejection of the said Composition and Extension Proposal.

On June 4, 1943, appellees filed a Petition for Adjudication under Section 75-s of the Bankruptcy Act, and on said date an Order of Adjudication and of General Reference was made pursuant to said Section. [Tr. pp. 5-6, 7.]

On July 19, 1943, appellees filed a Petition for Determination of Existing Lien and Encumbrance. [Tr. pp. 8-12.]

On July 20, 1943, appellant filed a Petition for an Order to Apply Moneys to Payment of Debt. [Tr. pp. 16-19.] The aforesaid two petitions were heard and determined together, and an order was filed respecting the same together with Findings of Fact and Conclusions of Law on August 1, 1944. [Tr. pp. 20-42.]

Appellant appealed from said order to the District Court of the United States, Southern District of California, Central Division. [Tr. pp. 43-52.]

On November 14, 1946, said Court affirmed the prior order of August 1, 1944, and filed a Memorandum of Decision thereon. [Tr. pp. 58-65.]

Appellant has taken this appeal from said Order of November 14, 1946. [Tr. p. 66.]

Statement of Facts.

In 1927 appellees owned certain ranch property in Leona Valley, Los Angeles County, California, consisting of approximately 3,000 acres. They had encumbered this property with a $35,000 Deed of Trust and Declaration of Trust in favor of Liberty Bank of America. The purpose of this loan was to finance the sub-division of this property into residential lots, and appellees had begun to sub-divide and sell the land in accordance with said Declaration of Trust. On January 13, 1927, appellees organized a California corporation known as FARM HOME BUILDERS, which corporation was and is wholly owned by appellees. On April 9, 1927, title to the said property was transferred to Farm Home Builders.

On July 30, 1927, Farm Home Builders borrowed $45,000.00 from Pan-American Bank of California, evidenced

by a promissory note [Petitioners' Exhibit No. 6, Tr. pp. 139-140, 239-244] and secured by a deed of trust [Petitioners' Exhibit No. 1-B, Tr. pp. 140-150] and by a declaration of trust. [Tr. pp. 23, 24.]

This loan was used to pay off the indebtedness to Liberty Bank of America and to provide additional capital for the sub-division of the property into residential lots.

On July 19, 1929, the California Superintendent of Banks took over the Pan-American Bank. [Tr. p. 58.]

The original declaration of trust with Pan-American Bank was superseded by a declaration of trust No. 5873, dated December 2, 1929. [Citizens Bank Exhibit No. 4, Tr. pp. 275-299.]

On January 7, 1930, and on August 20, 1931, the Superintendent of Banks executed grant deeds to all of said property to the Citizens National Bank & Trust Company of Los Angeles which was trustee under said declaration of trust No. 5873.

The said note of July 30, 1927, provides in part as follows:

STRAIGHT NOTE.

DO NOT DESTROY THIS NOTE: When paid, this note with Deed of Trust securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made. $45,000.00 Los Angeles, California, July 30th, 1927

On or before Five (5) years after date, for value received, I, we, or either of us, promise to pay to PAN AMERICAN BANK OF CALIFORNIA, a corporation, or order, at PAN AMERICAN BANK OF CALIFORNIA, Los Angeles, Calif., the sum of FORTY-FIVE THOU-

SAND AND NO/100 ($45,000.00)—DOLLARS, with interest from date until paid, at the rate of Seven (7%) per cent per annum, payable quarterly, in advance.

Should interest not be so paid it shall become part of the principal and thereafter bear like interest. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. This note is secured by a DEED OF TRUST to TITLE INSURANCE AND TRUST COMPANY, a corporation, of Los Angeles, California.

FARM HOME BUILDERS, INCORPORATED
By F. D. Hall, President
By Erwin S. Hall, Secretary.

The said declaration of trust No. 5873 conveys said real property to the trustee to hold until the sale or disposition of all of the property subject to the trust and the distribution of the proceeds thereof in accordance therewith. The only interest of Farm Home Builders thereunder is to receive any sums remaining in the hands of the trustee after first deducting the amounts necessary for the payment of all items shown in the trust.

The trust provides for release prices for each lot. On October 28, 1935, the trust was amended to reduce the release prices. [Petitioners' Exhibit No. 1A, Tr. pp. 176-181.] On February 9, 1939, a further amendment was made, further reducing the release prices. [Petitioners' Exhibit No. 1-A, Tr. pp. 182-201.] Each of these amendments acknowledged and reaffirmed the existence of the trust and left it unchanged except for the new prices.

Farm Home Builders' corporate powers were suspended on June 26, 1930, and were not revived until November 22, 1940. During this period of suspension, the corporation purported to convey its rights to the said property to the appellees on December 12, 1932. [Tr. p. 25.] The trust provides that no transfer of any interest thereunder shall be valid or binding on the trustee until the instrument accompanying the same shall be accepted by the trustee. The trustee has never accepted the purported transfer of interest in the property by Farm Home Builders. The trustee has always dealt with Farm Home Builders and never with appellees individually, as beneficiary under said trust.

Appellant acquired the interest of Pan-American Bank in the aforesaid note of July 30, 1927, deed of trust and declaration of trust as amended on November 2, 1939, from the Superintendent of Banks for a valuable consideration. [Petitioners' Exhibit No. 1-G, Tr. pp. 202-205.]

During the administration of the estate herein, in July, 1943, pursuant to court order, certain sales of portions of the real property were authorized and consummated aggregating approximately $49,878.38 net, which sum is being held by the trustee subject to court order. [Tr. p. 30.]

On June 4, 1940, appellees being in default on payment of principal, interest and taxes, appellant directed the trustee to declare all obligations under said trust due and owing and to proceed to a trustee's sale. Notice of sale was given on July 3, 1940, and the sale was noticed

for November 13, 1940. [Petitioners' Exhibit No. 1-I, Tr. pp. 219-238.]

On November 4, 1940, appellees filed an action in the Superior Court of the State of California, County of Los Angeles, Case No. 457525, seeking both a temporary and permanent injunction against the trustee and the appellant to enjoin a foreclosure sale of the real property under the aforesaid deed of trust and to enjoin a sale under either the deed of trust or under the aforesaid declaration of trust. [Tr. pp. 112-138.] An appeal was taken from the judgment of the Superior Court in said case and on July 28, 1942, the District Court of Appeal (First District, Division 2) held that the appellees were entitled to no injunctive relief and gave judgment in favor of the appellant and the trustee (*Hall v. Citizens National Bank,* 53 Cal. App. (2d) 625). The appellees' petition for a hearing by the Supreme Court of California was denied on September 24, 1942.

In the aforesaid State Court action begun on November 4, 1940, the appellees admitted on verified complaint that the said note of July 30, 1927, and the said declaration of trust No. 5873 and deed of trust were in full force and effect. Their complaint alleged as follows:

> "From and after July 30, 1932, and continuously up to on or about November 1, 1939, defendants, Title Company and Citizens Bank, and the Pan-American Bank in Liquidation, and thereafter to on or about June 1, 1940, said defendants, Title Company and Citizens Bank, continued to receive payments derived from the proceeds of the sale of real property and to apply same in the reduction of the principal sum of said note, and the payment of inter-

> est thereon in the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30, 1932, and said Title Company and Citizens Bank and the plaintiffs continued to operate under their respective Trusts, (Deed of Trust dated July 30, 1927, and Trust No. 5873), after July 30, 1932 in the same general manner as prior thereto." [Tr. p. 121.]

In said complaint, appellees further admitted with respect to the aforesaid trust amendment of October 28, 1935:

> ". . . except for the change in the schedule of minimum selling and release prices, each and all of said parties continued to operate under said declaration of trust No. 5873 in the same manner as they had operated prior to July 30, 1932." [Tr. p. 122.]

Similarly, with respect to the aforesaid trust amendment of February 9, 1939, appellees alleged and admitted that

> ". . . it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the appellees Frank D. Hall and Marguerite S. Hall should continue to sell and dispose of the real property described in said deed of trust, and that from the proceeds derived from such sales, payments should be made on said note in the reduction of the principal sum and in the payment of interest; and that except only for the change in the schedule of release prices, the parties thereto, and the Title Company, were to and should continue to act and perform their respective duties and functions under said declaration of trust in the same manner and for the same purpose as prior to July 30, 1932. . . ." [Tr. p. 123.]

Among the matters decided in the State Court action was the determination that the appellees were in error in their contention that the trustee and the appellant had waived payment of principal or interest on the obligation herein so as to bar appellant from foreclosing on the property or causing the same to be sold by the trustee. The District Court of Appeal in its aforesaid opinion necessarily found the obligation to be in full force and effect, since it held that the Superior Court had ". . . further erred in holding that no sale under the declaration of trust could be made for failure to pay principal or interest."

The detailed facts concerning the obligation of the appellees may be determined from a statement, dated October 8, 1942, prepared by the trustee and sent to the appellees covering the period from August 19, 1927, to October 30, 1942. [Tr. pp. 251-266.]

Periodic statements of account were rendered by the trustee to the appellee during the years 1933 to 1940, inclusive, to which the appellees have at no time made any objection. [Tr. pp. 27-29.]

The aforesaid periodic statements of the trustee show the following payments on account of principal [Tr. pp. 251-266]:

Jan. 1, 1933	to May 9, 1933	$ 447.33
Sept. 6, 1933	to Dec. 31, 1933	432.04
Jan. 1, 1934	to May 31, 1934	451.30
June 1, 1934	to Dec. 31, 1934	667.45
Jan. 1, 1935	to Dec. 31, 1935	306.22
Jan. 1, 1936	to Dec. 31, 1936	634.54
Jan. 1, 1937	to Dec. 31, 1937	1,852.55
Jan. 1, 1938	to Dec. 31, 1938	1,953.95
Jan. 1, 1940	to Dec. 31, 1940	1,264.08

The aforesaid statement for the period from January 1, 1940, to Dec. 31, 1940, also shows a payment to appellant of $363.85 on account of interest. [Tr. pp. 300-307.]

All interest due on said note was paid to and including January 30, 1932. Thereafter no payments on account of interest were made until the aforesaid payment as shown in 1940 account in the sum of $363.85. [Tr. pp. 27-29.] The aforesaid statement of October 8, 1942, shows a total unpaid balance due and owing as of October 30, 1942, including principal and interest, in the sum of $55,479.75.

Each of the aforesaid amendments to the trust, dated Oct. 28, 1935, and Feb. 9, 1939, recites that other than the new schedule of release prices for lots:

> ". . . that in all other respects the said declaration of trust shall be and remain in full force and effect and be binding upon the respective parties hereto." [Tr. pp. 177, 184.]

The original trust No. 5873 expressly provides that its scope is:

> ". . . to secure the payment of the indebtedness of the trustor to Pan-American Bank of California in the sum of $45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof." [Tr. p. 277.]

The said declaration of trust further provides that:

> "If one or more of the following events herein, called events of default, shall happen, that is to say;

"1. If default shall be made in the payment of interest due the Pan-American Bank of California, as and when the same shall become due and payable;

"2. If default shall be made in the payment of principal of the obligation due the Pan-American Bank of California, as and when the same shall become due and payable. . . .

"Then, and in each such case, the Trustee may, and upon the written request of the first payee, (Pan-American Bank) shall declare all obligations in favor of the Pan-American Bank of California, and/or the Citizens National Trust and Savings Bank of Los Angeles, together with interest thereon, due and payable and proceed to sell to the highest and best bidder such portion of, or all of the trust property, as in its discretion it may deem necessary or proper, or in one or more or all of the manners and methods hereinafter set forth; . . ." [Tr. pp. 288-289.]

The trust further provides as follows:

"The acceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust." [Tr. pp. 289-290.]

Appellant is the sole creditor of appellees.

POINT I.

The Total Amount of Lien and Encumbrance of the Appellant on the Property on December 9, 1942, Was $45,000.00, Plus 7% Interest Thereon Compounded Quarterly, Including Interest on the Unpaid Interest Thereon From July 30, 1927, to December 9, 1942, Less All Sums Paid on Account Thereof.

The first matter to be determined is:

Did the appellant have a valid and subsisting lien and encumbrance on certain real property of the debtors on December 9, 1942?

The lien and encumbrance claimed by the appellant is founded upon three separate but integrated obligations:

1. The declaration of trust, as amended;
2. The deed of trust; and
3. The promissory note.

In determining what claims of creditors are valid and subsisting obligations against the bankrupt at the time the proceeding under Section 75 of the Bankruptcy Act is begun, in the absence of overruling federal law, the law of the State of California controls.

> *Vanston Bondholders Protective Committee v. Green,* 329 U. S. 156; *Bryant v. Swofford Bros.,* 214 U. S. 279, 290, 291; *Security Mortgage Co. v. Powers,* 278 U. S. 149, 153, 154.

Since there is no pertinent federal law involved in a determination of the validity of the claim of the appellant, it is submitted that the law of the State of California con-

trols the determination of the validity of said claim as of December 9, 1942.

I-A.

The declaration of trust provides that:

> "The Farm Home Builders, Incorporated are indebted to the Pan-American Bank of California as evidenced by one certain promissory note, copy of which is attached hereto, marked Exhibit C, and made a part of this declaration of trust." [The note referred to is the aforesaid note of July 30, 1927, in the sum of $45,000.00—Tr. pp. 139-140; p. 276.]

The trust further provides that the trustee is to apply funds:

> "To pay to the Pan-American Bank of California, as first payee, all subsequent collections received by the Trustee on account of the principal of the sale price of all lots sold until there shall have been paid to first payee the amount of the release price of the respective lot or parcel, as shown in the schedule of release prices set forth in Exhibit 'F', attached hereto and made a part of this declaration of trust, or until all sums due first payee, together with the interest thereon shall have been paid in full." [Tr. p. 281.]

The agreement of February 9, 1939 [Tr. pp. 182-185], reaffirming said declaration of trust recites, as stated above, that other than the new schedule of release prices for lots ". . . that in all other respects the said declaration of trust shall be and remain in full force and effect and be binding on the respective parties thereto." Thus the agreement of February 9, 1939, operates to acknowledge, renew and reaffirm the said declaration of trust No.

5873. And it surely constitutes an acknowledgment of the obligation created by said trust within the meaning of Section 360 of the California Code of Civil Procedure.

The parties having reaffirmed the declaration of trust in writing as recently as February 9, 1939, less than four years prior to the institution of the within proceedings, and payments having been made pursuant to said declaration of trust as recently as 1940, it is clear that under California law the declaration of trust was a valid and subsisting lien and encumbrance on the said property on December 9, 1942, the date of filing the within proceedings.

Have the appellees any defense against the assertion of a lien and encumbrance by reason of said trust?

The trust provides, as stated above, that:

> "The acceptance of any sum or sums secured hereby, principal or interest, after the same becomes due and payable, or the performance of any or all obligations herein mentioned, shall not operate as a waiver of a right to insist upon the payment when due of all other sums secured hereby and the performance of any or all obligations herein mentioned, and to declare default and to proceed with the sale under this declaration of trust." [Tr. pp. 289-290.]

There is no evidence whatsoever of any written alteration, amendment, waiver or release of the obligation of the appellees under the trust subsequent to February 9, 1939. On the contrary, the amendment to the trust of February 9, 1939, as well as the payment of $1,627.80 on account of principal during the period from January 1,

1939, to December 31, 1939, and the payment of $1,264.08 on account of principal during the period from January 1, 1940, to December 31, 1940 [Tr. p. 305], indicate the intention of the parties to treat the obligations under the trust as valid and subsisting. Furthermore, the payment of $363.85 on account of interest during the period from January 1, 1940, to December 31, 1940, indicates the intention of the parties, consistent with the amendment of February 9, 1939, to recognize the obligation of the appellees to pay both principal and interest in accordance with the original obligation under the note and trust. [Tr. p. 305.]

The appellees have admitted, and both the Conciliation Commissioner and the District Court have found that appellees acquiesced in the trustee's annual statements concerning the payments made in 1939 and 1940. [Tr. p. 28.]

Any claim of a waiver of the appellant or the trustee of the right to receive interest during the period prior to February 9, 1939, is thus rendered untenable by the amendment of February 9, 1939, by the trustee's periodic statements for 1939 and 1940, and by the payments made pursuant to the trust as amended. We submit, therefore, that under the declaration of trust the appellant had a valid and subsisting lien and encumbrance on the real property in question on December 9, 1942, in the sum of $45,000.00, plus 7% interest thereon compounded quarterly from July 30, 1927, including interest on the unpaid interest thereon, to December 9, 1942, less all payments made. We further submit that there is no evidence of any waiver of the provisions of the original trust either before or after February 9, 1939.

Is there any rule of public policy which prevents the enforcement of such an obligation as is here involved?

The weight of authority in the United States is that where a contract provides for a certain rate of interest until the principal sum is paid, ". . . the contract governs until the payment of the principal or until the contract is merged in judgment."

> 33 Corpus Juris 225; *Board of Public Instruction v. Ashburn,* 101 F. (2d) 933; *Shepherd v. Pepper,* 133 U. S. 626; *Crumwell v. City of Sacramento,* 96 U. S. 51, 61; *Agency, Etc. Company v. American Can Company* (C. C. A. 2), 258 Fed. 263; *O'Neall v. Bookman,* 43 So. Car. Law (9 Rich. L. (80)); *Wright v. Eaves,* 31 So. Car. Equity, 10 Rich. Eq. (582); *O'Brien v. Young,* 95 N. Y. 428; *Sears v. Greater New York Div. Co.,* 51 F. (2d) 46 (C. C. A. N. Y.), Cert. Den. 284 U. S. 668; *Daniels on Negotiable Instruments,* 6th Ed., Vol. 21, Sec. 1458.

The payment of the contract rate of interest on an obligation such as that here involved is protected by the guaranty of Article I, Sec. 10(1) of the United States Constitution concerning the prohibition against impairment of the obligations of contract.

> *Morcley v. Lake Shore, Etc. Ry. Co.,* 146 U. S. 163, 168.

Even in the absence of an express provision in the contract as to the rate after maturity, the weight of authority is likewise that the stipulated rate before maturity will continue to apply after maturity.

> 33 Corpus Juris 226-227.

This was the rule in California before the Codes. (*Kohler v. Smith,* 2 Cal. 597.) And the California Supreme Court has held that the rule is ". . . general and well established" that interest bearing bonds continue to bear interest at the same rate after their maturity.

> *Trompeter & Co. v. Monaco,* 51 Cal. App. (2d) 668; *Kandall v. Porter,* 120 Cal. 106, 109; *Nash v. El Dorado Co.,* 24 Fed. 252 (Cir. Ct. Cal.).

Section 3289 of the Civil Code of California now makes the rule specific. It provides that:

> ". . . any legal rate of interest stipulated by a contract remains chargeable after a breach thereof as before until the contract is superseded by a verdict or other new obligations."

Thus the contract must be enforced in the instant case as the parties have agreed. And interest due and unpaid after maturity is to be added to principal and to bear like interest at the rate of seven per cent (7%) per annum, as provided, until paid.

This is in accordance with the settled law under Section 3289, Civil Code, that interest is due and payable after maturity at the contractual rate.

> *Trompeter & Co. v. Monaco, supra; Benjamin Moore & Co. v. O'Grady,* 9 Cal. App. (2d) 696, 700; *Reidy v. Miller,* 85 Cal. App. 765, 768; *Thompson v. Garner,* 104 Cal. 168; *Finger v. McGaughey,* 114 Cal. 64, 66; *Casey v. Gibbons,* 135 Cal. 368; *Cherokee Nation v. U. S.,* 270 U. S. 476, 490.

There are several additional California cases which reach the same conclusions without express reference to Section 3289 of the Civil Code.

In *Bell v. San Francisco Savings Union,* 153 Cal. 64, the note bore interest at the rate of 2/3 of 1% per month "until payment of the principal." In case of default of principal or interest, such amounts were to bear interest at the rate of one per cent (1%) per month from maturity until paid. It was held that interest on interest at a rate greater than that borne by the principal was void under Section 1919, Civil Code. But it was held to be proper, after maturity of the principal, to allow interest both on principal and on unpaid accrued interest at the same contract rate which had applied before maturity.

The most recent California case confirming the settled rule that interest will be allowed after maturity until payment or judgment is *Ramillard Brick Company v. R. Dandini Company,* 51 Cal. App. (2d) 744, in which interest at the rate of seven per cent (7%) per annum was allowed even where no interest had been specified.

See also *Nesbit v. MacDonald,* 203 Cal. 219; *Foster v. Beau De Zart,* 13 Cal. App. 128; *O'Neil v. Magner,* 81 Cal. 631; *Chafoin v. Rich,* 92 Cal. 471, 474; *Bank of U. S. v. Foreman,* 102 Cal. App. 756; *U. S. Natl. Bank of Portland v. Waddingham,* 7 Cal. App. 172; *Thrasher v. Moran,* 146 Cal. 683; *Lane v. Glukhauf,* 28 Cal. 288, 294, 295; *Guy v. Franklin,* 5 Cal. 416; *Emeric v. Tams,* 6 Cal. 155; *Mount v. Chapman,* 9 Cal. 294, 297.

The rule is set forth in 19 Cal. Jur. 1058, as follows:

"It is, of course, fundamental that where an instrument provides for a permissible rate of interest, interest shall be allowed accordingly.

"*Thompson v. Gardner* (104 Cal. 168); *Hathaway v. McGillycudahy,* 56 Cal. App. 689; *Riegel v. Wollenshlager,* 49 Cal. App. 300; *Davidson v. Rafael,* 37 Cal. App. 258; *Bither v. Christensen,* 1 Cal. App. 90.

"After a note becomes due, it bears interest at the rate agreed, although nothing is said about interest after maturity. Citing *Kohler v. Smith,* 2 Cal. 597; *Puppo v. Larosa,* 68 Cal. 393.

"The proper method of allowing interest in such a case, in a case where the instrument provides for interest after maturity, is to compute interest at the rate fixed from its date or from its maturity to the date of the decision or entry of judgment, and to add such interest to the principal, which aggregate amount must thereafter bear interest at the legal rate.

"Citing *Glenn v. Rice,* 174 Cal. 269; *LeBreton v. Stanley, Etc. Co.,* 15 Cal. App. 429; *U. S. National Bank v. Waddingham, supra.* See *Alpers v. Schammel,* 75 Cal. 590."

So, also, in *California S. F. Corporation v. Bessolo & Gualano,* 118 Cal. App. 327, 332, the Court held that in an action on a promissory note the payee "was entitled to interest in accordance with the provisions of the promissory note from its date until the date of the rendition of judgment. . . ."

Johansen v. Klipstein, 104 Cal. App. 128, 132, was a suit on a promissory note, where, as in the instant case, the debtor claimed a waiver of interest after maturity and where, as here, a payment had been made on account of principal after maturity. The Court said:

> "The note on its face was payable on or before July 1st, 1922, with interest at the rate of seven per cent (7%) from maturity until paid. The note itself was a contract. The intention of the parties is to be gathered from the face of the instrument. There is an express agreement to pay on or before a certain date, and a provision that interest shall be payable from maturity. This was equivalent to saying that interest should be payable from July 1, 1922. That this was the intention of the parties and that they contemplated that interest should be paid during any extension is indicated by the provision on the face of the note, that it shall bear interest from maturity, until it is paid. The endorsements later made merely postponed the date on which payment might be enforced, but there is nothing to indicate any intention to relieve the maker from paying the interest which is provided on the face of the note to be paid from the date of maturity until the time of payment."

Since the declaration of trust was acknowledged and reaffirmed by the agreement of February 9, 1939, less than four years prior to the commencement of the instant proceedings, it is not barred by the statute of limitations. That being true, interest must be allowed on the full obligation in accordance with the contract of the parties from its inception to December 9, 1942.

I-B.

The lien and encumbrance claimed by the appellant is also based upon the deed of trust, dated July 30, 1927.

The validity of appellant's claim based upon the deed of trust is controlled by California law, as indicated above.

It is well settled under the law of this State that a power of sale in a deed of trust is never outlawed by the Statute of Limitations, and that the trustor cannot quiet title against the deed of trust without payment of the full amount owing thereunder regardless of the time which has elapsed from the date of maturity.

> 10 Cal. Jur.—Equity Sec. 50, 52; *Shimpones v. Stickney,* 219 Cal. 637; *Meetz v. Mohr,* 141 Cal. 667; *Toule v. Santa Cruz Title Co.,* 20 Cal. App. (2d) 495; *Dool v. First Nat. Bank,* 207 Cal. 347; *cf. Puckhaber v. Henry,* 152 Cal. 419.

Section 2905, California Civil Code provides:

> "Redemption from a lien is made by performing or offering to perform the act for the performance of which it is a security and paying or offering to pay the damages, if any, to which the holder of the lien is entitled for delay."

See also: 18 Cal. Jur.—Mortgages, Sec. 513.

Under California law, the basic rule is that "enforcement of a power of sale contained in a deed of trust is never outlawed by the lapse of time alone."

> *Welch v. Sec. First Nat. Bk. of L. A.,* 61 Cal. App. (2d) 632, 635, citing *Bank etc. v. Bentley,* 217 Cal. 644, 655.

See also: *Summers v. Hallam Cooley Ent.,* 56 Cal. App. (2d) 112; *Howell v. Dowling,* 52 Cal. App. (2d) 487, 497; *Jensen v. Duke,* 71 Cal. App. 210; *Barberi v. Rothchild,* 7 Cal. (2d) 537; *Sacramento Bk. v. Murphy,* 158 Cal. 390.

In *Flack v. Boland,* 11 Cal. (2d) 103, 106, the court said that despite the fact that the secured creditor could not bring a suit for foreclosure, he may, where the trust deed permits, foreclose by trustee's sale, and that the lapse of the statutory period on the principal obligation is no bar to such trustee's sale.

In *Hamaker v. Williams,* 22 Cal. App. (2d) 256, 257, the court said:

> "It is well settled that the Statute of Limitations never runs against the power of sale in a deed of trust, that the title remains in the trustee until the debt is paid or the property sold, and that the power of sale may be enforced when otherwise the debt would be barred by statute. (*Travelli v. Bowman,* 150 Cal. 587, ...; *Sacramento Bank v. Murphy,* 158 Cal. 390; *Bank of Italy etc. Assn. v. Bentley, supra.*)"

25 Cal. Jur. 76, Sec. 61, sets forth the law as follows:

> "While an action to foreclose a mortgage is barred by the Statute of Limitations when the debt to secure which it was given is barred, the expiration of the statutory time for bringing an action to enforce a personal obligation does not operate as an extinguishment or payment, and does not affect the title of the

trustee under a deed of trust, or extinguish the power of sale conferred upon him."

Citing: *Travelli v. Bowman,* 150 Cal. 587; *Sacramento Bk. v. Murphy,* 158 Cal. 390; *Grant v. Burr,* 54 Cal. 298; *Roberts v. True,* 7 Cal. App. 379.

In the case at bar, therefore, the power of sale under the deed of trust dated July 30, 1927, was valid and subsisting on December 9, 1942, the date of the filing of the petition under Section 75 herein. Furthermore since the agreement of February 9, 1939, expressly acknowledged and reaffirmed the validity and continuing effect of the note of July 30, 1927, which is the same note upon which the deed of trust is based, the deed of trust itself was valid and subsisting and not barred by the statute of limitations on December 9, 1942.

Thus in the case at bar where the appellees seek in effect to quiet their title against the claim and lien of the appellant, it is submitted that as a matter of law that they are barred from obtaining such relief because the power of sale under the deed of trust can never be outlawed by the statute of limitations. And under the facts in the case at bar, it is submitted that the said deed of trust was an effective obligation on December 9, 1942, so that in the absence of the instant proceedings the appellant could have elected either to foreclose thereunder or to cause a trustee's sale to be made thereunder.

Under these circumstances the claim and lien of the appellant may and should be based on the full obligation due, including principal and interest up to December 9, 1942, under the deed of trust.

I-C

The claim of the appellant herein is valid and subsisting, as of December 9, 1942, by reason of the said promissory note of July 30, 1927.

Here too the determination of the validity of the claim is controlled by California law. Section 360 of California Code of Civil Procedure provides as follows:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

As set forth above, on February 9, 1939, the declaration of trust #5873 was amended by an instrument in writing, executed by the parties hereto, which among other things acknowledged and reaffirmed the existence of said trust and continued it in effect unchanged except for new release prices on the subdivision lots. [Tr. pp. 182-186.] The said trust provides that:

> "The Farm Home Builders, Incorporated are indebted to the Pan-American Bank of California as evidenced by one certain promissory note, copy of which is attached hereto, marked 'Exhibit C' and made a part of this Declaration of Trust . . ." [Tr. p. 276.]

The note attached as Exhibit C is the aforesaid note of July 30, 1927.

The scope of the trust is stated to be:

> "To secure the payment of the indebtedness of the Trustor to Pan-American Bank of California in the

sum of $45,000.00 and interest thereon, together with any renewal and/or renewals and/or extensions thereof." [Tr. p. 277.]

The Trustee is empowered to apply funds

"to pay to the Pan-American Bank of California, as first payee, all subsequent collections received by the Trustee on account of the principal of the sale price of all lots sold until there shall have been paid to first payee the amount of the release price of the respective lot or parcel, as shown in the schedule of release prices set forth in Exhibit 'F', attached hereto and made a part of this declaration of trust, or until all sums due first payee, together with the interest thereon shall have been paid in full." [Tr. p. 281.]

It is clear that by executing the agreement of February 9, 1939, the appellees were acknowledging their obligation under the note of July 30, 1927, in the form and manner provided by Section 360, California Code of Civil Procedure. Furthermore, in addition to this written acknowledgment, the said payment of $1,264.08 on account of principal made in 1940, and the said payment of $363.85 on account of interest also made in 1940, and the admitted acceptance by the appellees of the trustee's annual statement covering the year 1940, and the letter of appellees dated August 9, 1942 [Tr. p. 273], all taken together surely establish an acknowledgment by appellees of their obligation under the note of July 30, 1927, within the meaning of Section 360, California Code of Civil Procedure.

As stated in *Van Cauteren v. Forger,* 45 Cal. App. (2d) 388, 392:

> "It is well established that the Code Section does not prescribe any form in which an acknowledgment or promise sufficient to lift the ban of the statute of limitations shall be made. It is sufficient that it shows that the writer treats the indebtedness as subsisting and one which the Debtor is liable and willing to pay. From this acknowledgment, the law implies the promise to pay. (*Concannon v. Smith,* 134 Cal. 14, 20, ...; *Foster v. Bowles,* 138 Cal. 346, 351, ...; *Clunin v. First Federal Trust Co.,* 189 Cal. 248, ...)"

As stated in 11 California Law Review 130:

> ". . . it was early established that a new promise would be inferred from the fact of part payment of interest or principal."

Bealy v. Greensladt (1831), 2 Cromp. & J. 61; *Hollis v. Palmer* (1836), 2 Bing. (N. C.) 713.

The English prototype of the American Statutes of Limitations, Lord Tenterden's Act, expressly provided that part payment of principal or interest should toll the statute. (9 Geo. IV, c. 14.)

This rule was approved in California as early as 1858. *Palmer v. Andrews,* 1 McAll. 491, Fed. Cas. #10683.

It has been reaffirmed both before and after the adoption of the codes.

Baron v. Kennedy, 17 Cal. 574; *Minifie v. Rowley,* 62 Cal. Dec. 611.

In *Clunin v. First Federal, etc. Company,* 64 Cal. Dec. 53, the rule was again approved, the Court stating that it was necessary that the payment or acknowledgment be made to the creditor. Since such was in the fact in the instant case, it clearly comes within the rule of the *Clunin* case.

And in *Aitube v. Aguire,* 39 Cal. App. Dec. 528, the Court held that the defense of the statute of limitations was also barred where the Debtor had given a note to the creditor as part payment on an obligation previously barred by the statute of limitations.

It has been held that while mere payments on account of an obligation barred by the statute of limitations are not sufficient to bar the defense of the statute, nevertheless, when such payments taken together with contemporaneous and subsequent letters and statements show an intention of the parties to treat such payments as an acknowledgment, that in such cases the appellees are barred from setting up the defense of the statute of limitations.

Wilson v. Walters, 66 Cal. App. (2d) 1.

It is also clear under the provisions of Section 360, California Code of Civil Procedure, that an *acknowledgment* of the obligation is all that is required; no actual promise to pay is necessary.

See *Foster v. Bowles,* 138 Cal. 346; *Curtis v. Holee,* 184 Cal. 726, 730.

Therefore, even if it be assumed that the note of July 30, 1927, was barred on February 9, 1939, nevertheless, the agreement of February 9, 1939, particularly in the

light of the payments made in 1940 and the account showing the same, as well as the appellees' letter of August 9, 1942, taken together necessarily constitute an acknowledgment of the said promissory note.

Since the within proceedings under Section 75 of the Bankruptcy Act were commenced on December 9, 1942, less than four years from the date of said agreement of February 9, 1939, it follows that the defense of the statute of limitations must fail herein, and the note be deemed valid and subsisting as of the date of filing said petition.

* * * * * * * * *

The District Court, in its opinion herein, held as follows:

> "Thus in the case at bar where the language of the note specifically provides for interest 'until paid,' it would seem that the contract rate of interest should be applicable after maturity." [Tr. p. 64.]

Apparently, the only obstacle to granting such interest is the finding in the next sentence that the right to that interest became barred with the expiration of the four-year period prescribed by the statute of limitations on July 30, 1936.

It appears that the agreement of February 9, 1939, although a part of the record before the District Court, was not considered by the Court in determining the continuing effectiveness of the declaration of trust.

In the light of that agreement, it is respectfully submitted that the declaration of trust, the deed of trust and the note were in full force and effect on the date of the filing of the petition under Section 75 herein on December 9, 1942, less than four years after the agreement of February 9, 1939.

POINT II.

The Appellant Being a Secured Creditor and Being the Sole Creditor and the Estate Being Ample to Pay the Entire Claim, as Well as Interest From and After the Filing of the Petition, Equity Requires the Payment of Interest From and After Filing Said Petition to the Appellant.

Let us first examine the ample character of the estate.

The sole assets of the appellees consist of certain real property in Leona Valley, Los Angeles County, California, consisting of about 3,000 acres, subject to a certain deed of trust and a certain declaration of trust.

The appellee Frank D. Hall stated in his testimony in the within proceedings on February 19, 1943, that after certain proposed sales were compelled there would be left approximately 760 acres of said above described land. [Rep. Tr. p. 420.]

The said appellee also stated he estimated the value of the aforesaid remaining property to be about $80,000.00 in his testimony in the within proceedings on February 11, 1943. [Rep. Tr. p. 322.]

In July, 1943, pursuant to an order of the Honorable H. Sindely Laughlin, Conciliation Commissioner-Referee in the above entitled proceedings, certain portions of the aforesaid property were sold to complete the aforesaid sales mentioned above, and as a result there was received into Court the sum of approximately $56,592.92. From this sum certain disbursements were authorized by the aforesaid Honorable Conciliation Commissioner-Referee leaving a net balance of $49,878.38, which sum is now being held by the Citizen's National Trust and Savings

Bank as trustee herein, subject to the order of the above entitled Court. [Tr. p. 30.]

The order of the said Honorable Conciliation Commissioner-Referee, affirmed by the District Court, provides for the payment by appellees of $23,921.52 on account of principal owing as of December 31, 1940, plus interest on the unpaid balance which existed on July 30, 1932, at the rate of 7% per annum to July 30, 1936, and no interest after July 30, 1936. The sum found to be due and owing on account of principal as of January 30, 1932, was $35,600.96. Thus the total obligation of the appellees to the appellant as determined by order of court to date is $33,834.23. [Tr. pp. 20-42 and p. 40.]

Pacific States Corporation contends that as of October 30, 1942, the appellees owed it the sum of $55,479.75 [Tr. pp. 251-266], and that the appellees now owe it the aforesaid sum plus interest thereon at the rate of 7% per annum compounded quarterly, with unpaid interest becoming part of the principal and thereafter bearing like interest until all principal and interest shall have been paid.

If the debt of the appellees herein is deemed to be the amount claimed by Pacific States Corporation, the total sum now due Pacific States Corporation by said appellees is $77,591.51, as of September 1, 1947. To satisfy this debt, there is now available the aforesaid sum of $49,878.38, together with the aforesaid 760 acres of real property, which property is worth at least $80,000.00, making the total assets available to satisfy the claim $129,878.38. This sum is certainly ample to pay the full claim of the appellant.

In the case of *Vanston Bondholders Protective Committee v. Green, supra,* the Court, in discussing the subject of allowance of interest on interest of creditors' claims in bankruptcy proceedings said:

> ". . . but bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principals. *Heiser v. Woodruff* ....., ..., ...; American *Surety Company v. Sampsell,* 327 U. S. 272; *Pepper v. Litton,* 308 U. S. 295, 303-306 . . .
>
> ". . . When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. *cf. Board of Commissioners of Jackson County v. U. S.,* 308 U. S. 343; *Royal Indemnity Co. v. U. S.,* 313 U. S. 289 . . . But where an estate was ample to pay all creditors and pay interest even if the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditors rather than to the debtor. *Coder v. Arts,* 213 U. S. 223, 245; *Sexton v. Dreyfus,* 219 U. S. 339. See, also: *Johnson v. Norris,* 190 Fed. 459. Analagous principals have been applied to the liquidation of national banks. *White v. Knox,* 111 U. S. 784, 786-787, relied on in *Sexton v. Dreyfus, supra,* 345; *Ticonic National Bank v. Sprague,* 303 U. S. 406, 412-413.

"It is manifest that the touchstone of each decision on allowance of interest in bankruptcy and receivership has been a balance of equities between creditor and creditors or between creditors and the debtor. See *Sexton v. Dreyfus, supra,* 346. That the proceedings before us has moved from equity receivership through Sec. 77-b to Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or Section 77-b reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co. v. Du Bois,* 312 U. S. 510, 527."

The award of interest on interest is supported in addition by the following non-bankruptcy cases:

Town of Genoa v. Woodruff, 92 U. S. 502; *Edwards v. Bates County,* 163 U. S. 269.

In the case at bar the appellant is the sole creditor of the appellees. The estate is ample to pay interest during the pendency of the bankruptcy proceedings.

In the case at bar there are many additional factors that recommend the exercise of judicial discretion in favor of allowing interest during the pendency of the within proceedings:

a. Since appellant is the sole creditor, and since it is a secured creditor, the allowance of such interest will not prejudice the rights of any other creditor and will merely carry out the original intention of the parties in applying the security to the satisfaction of the obligation of the appellees.

b. On the other hand to disallow interest to appellant from December 9, 1942, to date means that appellees will

have been given the use of at least $33,834.23 for almost five years without any charge therefor. This is clearly inequitable.

c. An additional reason why interest should be allowed during the pendency of the instant proceedings is that the appellees filed a composition and extension proposal on April 2, 1943, in the within proceedings in which as one alternative they proposed an extension agreement whereby all proceedings to foreclose the aforesaid real property should be stayed until August 1, 1947, and that during the interim between April 1, 1943 and August 1, 1947, the appellees proposed to recognize the principal unpaid balance due appellant as $50,000 and to pay interest on said sum at the rate of 4% per annum from and after August 1, 1944. [Tr. pp. 73-75.]

It appears equitable that the appellees should be required to pay a sum at least as great as that offered by them in their composition proposal. If the appellees would seek equity, they should not be permitted to do less in equity than they offered to do at the time of filing their extension proposal herein, particularly since even that proposal was deemed insufficient by the appellant.

The pendency of the instant proceedings has permitted the appellees to take advantage of the general rise in real estate values with the result that they are now able not only to pay off the entire indebtedness claimed by the appellant but to receive back a substantial refund or equity in the property in addition.

Surely it is equitable that if the appellant is to be permitted to take advantage of this increase in real estate

values, and if there is still sufficient money to pay the entire claim of the appellant with interest during the bankruptcy proceedings, that said interest should be allowed. This is particularly true when it is remembered that appellees have achieved a delay against the sale of the property under the deed of trust since November 4, 1940, when the aforesaid suit #457525 was filed by them in the Superior Court of Los Angeles County. Thus considering both the State Court action and the instant proceedings, the appellees have delayed said sale of said property for almost seven years. At the beginning of said seven-year period, the appellees had little or no equity in said property. Today even if the full claim of the appellant be allowed as prayed, the appellees have. nevertheless, a substantial equity in the property. It appears highly equitable, therefore, that since the appellees have paid no interest to the appellant during this period and since the appellant has been disabled from proceeding to sell the property or reimburse itself in any manner whatsoever from the sale thereof, that the appellant should receive interest during the period of the instant proceedings.

It is, therefore, respectfully submitted that in accordance with the authorities cited in the case of *Vanston Bondholders Protective Committee v. Green, supra,* and in accordance with the equities of the instant case, that interest should be allowed to the appellant during the instant proceedings. It is further respectfully submitted that the denial of such interest by the District Court is contrary to the law and an abuse of discretion under the facts here involved.

POINT III.

The Judgment in the Case of Hall v. Citizens National Bank, 53 Cal. App. (2d) 625, Is Res Judicata That the Obligation of Appellees Was Valid and Existing Under the Declaration of Trust and the Deed of Trust on November 4, 1940, and That the Appellant Had Not Waived and Was Not Estopped From Enforcing the Same.

The appellees and the appellant were adverse parties in the State Court proceeding. The issue involved was whether or not the appellees were entitled to injunctive relief against a foreclosure sale of the real property in issue herein under the said deed of trust as amended, and against a sale under either said deed of trust or said declaration of trust.

The validity and continuing effect of the declaration of trust and of the deed of trust and the note were the matters in issue. The appellees admitted in their verified complaint that the declaration of trust and deed of trust and the note were in full force and effect:

> "From and after July 30, 1932, and continuously up to on or about November 1, 1939, defendants, Title Company and Citizens Bank, and the Pan-American Bank in Liquidation, and thereafter to on or about June 1, 1940, said defendants, Title Company and Citizens Bank, continued to receive payments derived from the proceeds of the sale of real property and to apply same in the reduction of the principal sum of said note, and the payment of interest thereon in the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30, 1932, and said Title Company and Citi-

zens Bank and the plaintiffs continued to operate under the respective Trusts (Deed of Trust dated July 30, 1927, and Trust No. 5873), after July 30, 1932, in the same general manner as prior thereto." (*Ibid.* pp. 8-9.) [Tr. p. 121.]

Appellees further admitted in said verified complaint that with respect to the aforesaid trust amendment of October 28, 1935:

". . . except for the change in the schedule of minimum selling and release prices, each and all of said parties continued to operate under said declaration of trust No. 5873 in the same manner as they had operated prior to July 30, 1932." (*Ibid,* p. 9.) [Tr. p. 122.]

Similarly, with respect to the aforesaid trust amendment of February 9, 1939, appellees alleged and admitted that:

". . . it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the plaintiffs, Frank D. Hall and Marguerite S. Hall, should continue to sell and dispose of the real property described in said deed of trust, and that from the proceeds derived from such sales, payments SHOULD BE MADE ON SAID NOTE IN THE REDUCTION OF THE PRINCIPAL SUM AND IN THE PAYMENT OF INTEREST; and that except only for the change in the schedule of release prices, the parties thereto, and the Title Company, were to and should continue to act and perform their respective duties and functions under said declaration of trust in the same manner and for the same purpose as prior to July 30, 1932 . . ." (*Ibid.,* p. 10, lines 5-16.) [Tr. p. 123.]

Appellees contended in said complaint that appellant and the trustee, Citizens Bank, had waived payments of principal and interest and, therefore, were estopped from declaring appellees to be in default for failure to pay the same.

The issue before the Superior Court, as well as before the District Court of Appeal, was whether or not there had been a waiver or estoppel by the appellant or the trustee so as to bar appellant from its right to receive the entire sum including principal and interest provided in the obligation.

It is respectfully submitted, therefore, that the judgment of the District Court of Appeal in that case (53 Cal. App. (2d) 625), being a final judgment, is *res judicata* on the following issues:

1. That the declaration of trust as amended and the deed of trust and the note were in full force and effect as of November 4, 1940, the date of filing the Superior Court action.

2. That neither the appellant nor the trustee, Citizens Bank, had waived the payment of any sum of principal or interest on said declaration of trust as amended, said deed of trust or said note.

3. That there was no ground whatsoever for enjoining or restraining the appellant or said trustee from proceeding to a trustee's sale under the declaration of trust as amended, or the deed of trust, and to reimburse itself in full for principal and interest to date out of the proceeds of said sale.

The District Court of Appeal held that the Superior Court had ". . . further erred in holding that no sale under the declaration of trust could be made for failure to pay principal or interest."

The District Court of Appeal further held that ". . . on November 13, 1939, taxes, principal and interest were in default." (53 Cal. App. (2d) 625, 638.)

In effect, appellees now seek to litigate all these issues once again in the Federal Court proceedings under Section 75; we respectfully submit that the parties and the issues being the same, the prior State Court suit is *res judicata.*

This is in conformity with the State law of California: Code of Civil Procedure, Sections 1908, 1910 and 1911.

This is equally in conformity with the Federal law applied to bankruptcy proceedings. See: *In re Paula Bldg. Corp.,* 86 F. (2d) 657.

It has been similarly held that decrees of a State Court are binding on a trustee in bankruptcy in a subsequent plenary action involving the same defendants and substantially the same issues.

> *Detroit Trust Company v. Schantz,* 16 F. (2d) 943; *Throckmorton v. Hickman,* 279 Fed. 196; *Life Ins. Co. & Burgoine v. Drake,* 214 Fed. 536; *MacDonald v. Guy,* 63 F. (2d) 334; *West v. Central Union Trust Co.,* 2 F. (2d) 585.

It has been held in *Pacific Hotel Apt. Co. v. Arcady-Wilshire,* 89 F. (2d) 248, that a prior decree dismissing a grantee's prior action to enjoin an impending trustee's

sale of real property was *res judicata* and estopped the grantee from thereafter maintaining an action against the trustee and purchaser at trustee's sale where the issue in both cases was the validity and continuing existence of the deed of trust. (See also, *Northern Pac. R. R. Co. v. Shaght,* 205 U. S. 122.)

The application of the law of *res judicata* to the case at bar is somewhat similar to that involved where there has been a removal of a case to a Federal Court from a State Court after procedural or substantive of rights between the parties have been finally determined by a judgment or order of the State Court.

In such cases the general rule is that the judgment or order of the State Court is binding upon the Federal Court.

> *Duncan v. Degan,* 101 U. S. 810; *Brooks v. Farwell,* 4 Fed. 166; *Guernsey v. Cross,* 153 Fed. 822; *Allmark v. Platte S. S. Co.,* 76 Fed. 615; *Hoyt v. Ogden Port. Cem. Co.,* 185 Fed. 889; *Lookout Mt. R. R. Co. v. Houston,* 44 Fed. 449; *Phoenix Ins. Co. v. Charleston Bridge Co.,* 65 Fed. 628; *Loomis v. Carrington,* 18 Fed. 97; *Denison v. Shawmut Min. Co.,* 124 Fed. 860; *Savel v. So. R. Co.,* 93 F. (2d) 377; *Wann v. National Lead Co., 27* F. Supp. 217.

The application of the doctrine of *res judicata* to the case at bar is in harmony with the cases decided in the State of California. In *Denio v. Huntington Beach, 22* Cal. (2d) 580, it was held that a judgment upholding the validity and binding effect of a contract of employment calling for payment of attorney's fees of percentages of certain royalties received by the defendant was *res judicata*

on the issues of frustration, *ultra vires,* failure of consideration, fraud, gift, and exemplary damages raised by the defendant in a later action against it to recover such royalty payments subsequently received by the defendant.

In holding the doctrine of *res judicata* applicable, the Court said:

> "Nor do we think the cause of action herein is so essentially different, in a sense material here, from that set forth in the former action as to avoid the effect of the usual rule against the splitting of defenses. As was said in *Panos v. Great Western Packing Company,* 21 Cal. (2d) 636, 134 P. (2d) 242, 244: 'The cause of action is simply the obligation sought to be enforced.' In a very real sense this action involves the same obligation which was litigated in the former action. The obligation sought to be enforced in this action, as well as in the former action, is that of the contract for compensation for legal services. If that contract is valid and enforceable to the extent of requiring the payment of a percentage of moneys received from a certain source for a certain period, it would be entirely inconsistent to hold that a judgment upholding that contract for a part of the period provided for had no binding effect on the claim for compensation for the remainder of the period covered by the contract. The validity and binding effect of the contract for services was the basic issue in the former action and is the basic issue in the present issue. In *Sutphin v. Speik,* 15 Cal. (2d) 195, ... P. (2d) 652, 101 P. (2d) 497, the validity of an assignment was the basic issue in the case cited although somewhat different facts were involved. In holding that the judgment in the first action was *res judicata* the court said: 'After that judgment became final, plaintiff's right to a portion

of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case.' In *DeHart v. Allen,* 26 Cal. (2d) 829, 161 P. (2d) 453, a judgment in a former action was held *res judicata* since issues as to the validity and binding effect of a certain lease either were raised or could have been raised in the prior action.

"Moreover, facts were settled in the former action, which was between the same parties, which are controlling here, namely, the execution, validity and binding effect of the contract for services between these parties. The validity and binding effect of that contract was actualy litigated and determined in the former action. As was said in *In re Estate of Clark,* 190 Cal. 354, 212 Pac. 622, 625, a 'judgment is binding, not only in proceedings upon the same, but also upon a different cause of action in so far, as it settles and determines questions of fact. 23 Cyc. 1288-1290. It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. *Freeman on Judgments,* Secs. 249 and 253; *Lamb v. Wahlenmaier,* 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66; *Reed v. Cross,* 116 Cal. 473, 484, 48 Pac. 491; *Atchison T. & S. F. R. Co. v. Nelson,* 9 Cir., 220 Fed. 53, 135 C. C. A. 621. That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law,

chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; *Rauer v. Rynd,* 27 Cal. App. 556, 150 Pac. 780."

And in *Olney v. Cavell,* 138 Cal. App. 233, 32 P. (2d) 181, 182, the Court said:

"This case seems to come squarely within the meaning of section 1911 of the Code of Civil Procedure. The same question between the same parties being necessarily involved in the present case, the former adjudication was conclusive 'not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy * * * which also might have been raised and decided.' *Minnis v. Equitable Life Assur. Soc.,* 204 Cal. 180, 183, 267 Pac. 538, 539; *In re Estate of Bell,* 153 Cal. 331, 95 Pac. 372; *Elm v. Sacramento Suburban Fruit Lands Co.,* 217 Cal. 223, 17 P. (2d) 1003. 'It is not what was actually done, but what might have been done, that is concluded by a former judgment.' *Henderson v. Miglietta,* 206 Cal. 125, 127, 273 Pac. 581, 582.

"The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action."

Not only is the instant suit governed by the determinations of fact in the prior State Court action, but it is respectfully submitted that the doctrine of *stare decisis* is applicable herein to the extent that determinations of law made on such facts as were decided by the State Court action are equally binding here.

The rule is similar to that announced in *Gore v. Bingaman,* 20 Cal. (2d) 118, in which the Court said:

> "Where a question of law once determined is sought to be relitigated upon a second appeal to the same appellate court, it is equally established that the first determination is the law of the case and will not be re-examined in the absence of unusual circumstances leading to injustice or unfairness even though the issue sought to be raised involves the jurisdiction of the court in the prior appeal."

As stated in *Slater v. Shell Oil Co.,* 58 Cal. App. (2d) 864:

> "The text writers are not in accord whether the doctrine applicable is *res judicata,* estoppel, merger of judgment, or election of remedies. The latter doctrine is an 'extension of the law of estoppel.' *Mailhes v. Investors Syndicate,* 220 Cal. 735, 738, 32 P. 2d 610, 611. Merger of judgments is also an application of the same doctrine. *Res judicata* has many of the features of estoppel particularly when based upon the same cause of action. Whatever the doctrine applicable all unite in the principle that one who has had his day in court should not be permitted to further vex his adversary by a

subsequent action for the same relief. *Panos v. Great Western Packing Co.,* Cal. Sup., 134 P. 2d 242."

Since the principal object in the former State Court action was to obtain a determination as to whether or not the declaration of trust as amended and the deed of trust were valid and in effect, and whether or not the appellees were in default thereunder, and whether there had been any waiver of principal or interest by the appellant or by the trustee, Citizens Bank, and since all those issues were determined, it is respectfully submitted that in the light of the foregoing authorities those issues cannot be relitigated.

It has been held that where the right of a litigant in a certain trust has once been determined, a later suit affecting substantially the same issue was barred by the former action. *Papineau v. Sec. First Nat. Bank of L. A.,* 45 Cal. App. (2d) 690.

In *Detweiler v. Clune,* 77 Cal. App. 562, plaintiff attempted to rescind a contract on two grounds, fraud and failure of consideration. Having failed in that action, he then sought to recover the money paid by him under the contract on the ground of failure of consideration. The court held the two actions were the same, notwithstanding the fact that the prior action was for rescission and the subsequent action was for recovery upon a consideration that had failed.

The *Papineau* case, *supra,* quotes with approval from Freeman on Judgments, Fifth Edition, Sec. 672, pages 14-18, as follows:

> "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action, it is *res judicata* when it comes again in issue in another action between the same parties, though the immediate subject matter of the actions be different."

In *Wright v. Sec. First Nat. Bk.,* 35 Cal. App. (2d) 264, the court, in a case involving a subdivision trust similar to that involved in the case at bar, held that where trust beneficiaries had failed to present their claim of interest for equity in the land conveyed by them to the trustee, in a prior trustee's action to foreclose the pledge of their beneficial interest in the trust, they were estopped to litigate such question in a subsequent ejection action brought by them against the trustee.

In *Birkhofer v. Krumm,* 27 Cal. (2d) 513, it was held that in an action for a deficiency judgment under a deed of trust pleadings and findings in a previous action by the same plaintiffs and their predecessor in interest against the same defendant to recover on an independent guaranty contract originally comprised in an extension agreement were admissible as *prima facie* evidence of default under the obligation of the deed of trust where such finding was responsive to the issue and material in both cases.

The court said:

> "The findings in respect on default on the note here involved were not outside the issues, Case #37019, but were responsive to issues made by the pleadings in that case and indeed the making of them was essential to the application of the *ratio decidendi* there, for unless it were found that there had been a default in one or more payments on a note, there would have been no occasion in that case to consider whether or not the alleged guaranty there insisted upon was effective as such or not."

Similarly, in the case at bar, the judgment of the District Court of Appeal is binding on the issue that the appellees were in default under the declaration of trust on November 13, 1939 (53 Cal. App. (2d) 625-638). To make such a finding, the court must have necessarily have found that the said declaration of trust was valid and existing as of said date. And that determination is, we submit, binding in the case at bar.

Furthermore, under the authorities cited above, it is clear that the State Court action is also determinative of the validity and existence of the trust as of November 4, 1940, against any and all other objections that the appellees might have urged against the same, even though such objections were not urged in the State Court action. For, to use the oft repeated expression, "Our courts will not permit piecemeal litigation." Thus the judgment of the State Court is determinative of all defenses which

might have been raised by the appellees, including the defense of the statute of limitations, although that particular defense was not in issue in the State Court proceedings.

The Federal Court in the case at bar is a court of equity and the application of the doctrine of equitable estoppel of *res judicata* is particularly appropriate herein. Surely the appellees should not be permitted to deny the verified allegations and admissions in their complaint in the former State Court action by introducing the issue of statute of limitations in the instant proceedings, although the validity and continuing existence of the trust were admitted in the State Court action. After preventing the appellant for two years through the State Court action from conducting a trustee's sale of the trust property and after thwarting the possibility of such sale for the next five years by the instant proceedings, can the appellees in equity and good conscience be permitted to relitigate the issues already determined in the State Court or to alter their position established in their verified pleadings in the State Court action? It is respectfully submitted that as a matter of law, the doctrine of *res judicata* is applicable as hereinabove set forth, and it is further submitted that under the principles which govern the administration of justice in a court of equity, the appellees should be estopped from relitigating the aforesaid issues in the case at bar.

POINT IV.

There Is No Evidence of a Waiver of Estoppel With Respect to Payments of Principal or Interest Sufficient to Sustain the Judgment of the Lower Court.

The District Court, in its opinion, states as follows:

"The Commissioner found that Citizens Bank in its capacity as trustee prepared and rendered accounts of all collections, disbursements and distributions during the years 1933-1940, inclusive, and that each account set forth a statement of the unpaid balance of the promissory note obligation; that these accounts did not set forth any charge for or payment of interest; that the accounts were furnished to debtors and to the state officials in charge of the liquidation of the Pan-American Bank, and were accepted by them as true and correct; that acceptance of the accounts evidenced an intention on the part of the liquidator of Pan-American Bank to waive interest, and interest was so waived. As conclusions of law from these findings of fact, the Commissioner held that Citizens Bank, as trustee, and the liquidator of Pan-American Bank were estopped to claim interest after July 30, 1936, and that this estoppel applied to petitioner.

"There is ample evidence to sustain the Commissioner's findings and there is no error in the conclusions of law drawn therefrom. Indeed, it was not necessary to find that petitioner is estopped to claim interest, since both the principal obligation and all interest became barred by the California statute of limitations on July 30, 1936." [Tr. pp. 62-63.]

The bar of the California statute of limitations does not apply to the instant case by reason of the aforesaid agreement of February 9, 1939, acknowledging and reaffirming the declarations of trust and note contained therein.

It remains to be seen whether or not there is sufficient evidence to sustain the findings and conclusions with respect to the waiver or estoppel of interest payments.

We have demonstrated in Point I above that the agreement of February 9, 1939, acknowledges and reaffirms declaration of trust No. 5873. Other than changed prices for the lots, the original provisions of the trust are preserved intact. This in itself should be ample evidence that there was no intention of the parties to waive any payments of principal or interest up to and including February 9, 1939.

Furthermore the trust itself expressly provides that the acceptance of any particular payment shall not be deemed a waiver of any other payment or payments theretofore due. [Tr. pp. 289-290.]

We have in addition indicated that there has been no waiver or alteration of the rights of the parties by any executed oral agreement or by any written agreement. The record is bare of any specific evidence of waiver.

It has also been demonstrated that the appellees in the prior Superior Court action argued the issue of waiver of interest and that this issue was determined adversely to them. We have set forth in Point III above our reasons for submitting that the former State Court action is *res judicata* herein on this issue.

Another reason against a holding of waiver with respect to interest payments is that according to the opinion of the District Court herein the question of waiver only arises if it be first determined that the obligation of the appellees was barred by the statute of limitations on December 9, 1942. [Tr. p. 64.]

Since the agreement of February 9, 1939, removes the bar of the statute of limitations, it follows that pursuant to the reasoning of the District Court opinion herein the issue of waiver must be determined adversely to the appellees.

Furthermore this being an equitable proceeding, appellees should be precluded from claiming a waiver of interest where to do so would, if the judgment of the District Court herein be followed, result in the payment of a lesser sum to the appellant ($33,834.23), than that offered by the appellees in their composition and extension proposal of April 2, 1943 ($50,000.00 payable August 1, 1947, together with 4% interest per annum thereon commencing August 1, 1944). [Tr. pp. 74-75.]

The only pretext claimed by appellees for a waiver of interest is that the periodic statements of account of the trustee did not calculate the interest owing prior to 1942 and, therefore, did not add the unpaid interest to principal in said periodic statements.

It is submitted that these periodic statements cannot have had the effect of a waiver of payment of interest prior to February 9, 1939, by reason of the express agreement of the parties on that date reaffirming trust No. 5873 in its entirety including the obligation to pay interest.

It is further submitted that the appellees are estopped to claim such waiver of interest in the instant proceedings by reason of the fact in the aforesaid State Court action appellees admitted on verified complaint that the trustee, Citizens Bank, up to June 1, 1940 ". . . continued to receive payments derived from the proceeds of the sales of real property and to apply the same in the reduction of the principal sum of said note and the payment of interest thereon the same manner and according to the same practice which had been adopted and used by the Citizens Bank and Title Company, and each of them, prior to July 30th, 1932, and said Title Company and Citizens Bank and the plaintiffs continued to operate under the respective Trusts (Deed of Trust dated July 30th, 1927 and Trust No. 5873) after July 30th, 1932 in the same general manner as prior thereto. [Tr. p. 121.]

A further reason why appellees should be precluded from claiming a waiver of any interest is found in their further pleading in said complaint, referring to the aforesaid amendments of declaration of trust dated October 28, 1935, and February 9, 1939, ". . . that when each of said amendments was adopted, agreed to and executed, it was the mutual plan, purpose, intention, program and policy of all of the parties thereto and of the Title Company that notwithstanding the maturity date set forth in the promissory note, the time of payment of such promissory note should be suspended, extended and continued until such time and times as payment thereon could be made from the proceeds of sales of parcels of real property according to the respective minimum selling prices and release prices set forth from time to time, until the

sale of sufficient parcels of real property should be made to realize enough funds with which to pay said note; and that such mutual understanding continued uninterruptedly until on or about June 1st, 1940." [Tr. p. 123.]

Furthermore appellees alleged in said complaint with reference to the aforesaid amendments of the declaration of trust: ". . . that it was then the continuing mutual plan, purpose, intention, program and policy of the parties to said amendment and the Title Company that the plaintiffs, Frank D. Hall and Marguerite S. Hall, should continue to sell and dispose of the real property described in said Deed of Trust and that from the proceeds derived from such sales, payments should be made on said note in reduction of the principal sum *and in payment of interest;* . . ." [Tr. p. 123.] (Italics ours.)

Since the appellees relied primarily upon the periodic statements of account furnished by the said trustee, it is vital to recall that the 1940 statement of account reflects the payment of $1,264.08 on account of principal and $363.85 on account of interest. [Tr. p. 305.] And both the Conciliation-Commissioner and, impliedly, the District Court have found that the 1940 statement of account was accepted as true and correct by the appellees. The Conciliation-Commissioner found: "For the years 1939 and 1940 the said accounts were furnished to and received by Pacific States Corporation and by the debtor, Frank D. Hall, and were accepted by them as true and correct statements of account." [Tr. p. 28.]

It is clear that the reason why the statements of account for the years *prior* to 1940 did not reflect any

payments of interest is that there was not even sufficient money derived from the subdivision sales to make payment of the principal obligation much less the interest obligation and that is the only conceivable reason for the lack of computation of interest.

There is no statement in the periodic statements of account whereby the trustee purports to waive payment of interest. Nor was it within the province of the trustee to waive such payments.

The conduct of the parties can thus be ascertained by examining the statement of 1940 which was admittedly the most recent of the periodic statements and was admittedly acquiesced in by the appellees. [Tr. pp. 300-306 and p. 305.] Since this statement recites payment of interest, it may be inferred that the conduct of the parties was such as to evidence an intention of the obligation to pay interest still existed.

As stated in *Moore v. Wood,* 26 Cal. (2d) 621, "The practical interpretation of a contract by the parties constitutes cogent evidence of intent (*Roy v. Salisbury,* 21 Cal. 2d 176, 184, 130 P. 2d 706; *Tanner v. Title Ins. & Trust Co.,* 20 Cal. 2d 814, 823, 129 P. 2d 383; *Commercial Discount Co. v. Cowen,* 18 Cal. 2d 610, 116 P. 2d 599)."

The position of the appellant with respect to the principal and interest due from appellees was made clear to appellees by the computation of August, 1942. [Tr. pp. 251-256.]

We respectfully submit that in view of the law and the evidence set forth above there is no sufficient evidence of any waiver of interest by the trustee or by the appellant herein.

POINT V.

Appellees Do Not Have a Sufficient Interest in the Real Property in Question to Maintain the Instant Proceedings Under Section 75.

It is conceded that prior to the execution of the note, the deed of trust and the declaration of trust herein title to the real property had been conveyed by the appellees to Farm Home Builders, a corporation. [Tr. p. 25.] Farm Home Builders has been and is wholly owned and controlled by the appellees. [Tr. p. 25.] Because of this, the Conciliation-Commissioner and the District Court have found that the corporation was the *alter ego* of the appellees. [Tr. p. 58.]

The declaration of trust No. 5873 was executed by Farm Home Builders as owner of the real property. [Tr. p. 25.] Similarily, the amendments to the trust of October 28, 1935, and February 9, 1939, were executed by the corporation as owner of the property. [Tr. pp. 176-185.]

The trust prohibits a sale of any interest thereunder unless and until the same shall have been accepted by the trustee. [Tr. pp. 286-287.] It is conceded that although the corporation purported to assign its interest to the appellees on December 12, 1932, when it was legally disenfranchised, such transfer has never been accepted by the trustee or by the appellant.

The sole interest of the Farm Home Builders under the trust is to receive the surplus, if any, of the proceeds of a trustee's sale or sales thereunder subject to other prior claims set forth in the trust. [Tr. p. 283.]

The sole rights of the appellees under said trust are to live on the property and manage the subdivision sale of same and to receive a commission of 30% for the sale of the trust property approved and consummated by the trustee—so long as Farm Home Builders was not in default. [Tr. pp. 281, 284.]

Under these circumstances, the question of whether or not a debtor has any property rights in the land in issue is to be determined under state law.

> *Jelks v. Aetna Life Ins. Co.,* 134 F. (2d) 870 (C. C. A. Okla.); *Hoyd v. Citizens Bank, supra; U, S. Nat. Bk. of Omaha v. Pamp, supra; McLean v. Federal Land Bank,* 130 F. (2d) 123, 127; *In re Kofoed,* 46 Fed. Supp. 118.

If he has no such right under local state law, he cannot maintain a proceeding under Section 75.

> *Jelks v. Aetna Life Ins. Co., supra; Bernards v. Johnson* (C. C. A. 9), 103 F. (2d) 567, 571; *Wright v. Union, etc. Co.,* 304 U. S. 502; *In re Knauft,* 10 Fed. Supp. 785 (D. C. So. D., Calif.); *In re Faber,* 11 Fed. Supp. 555; *In re Lettich,* 10 Fed. Supp. 346 (D. C. Mich.); *Summers v. Rice,* 141 F. (2d) 310 (C. C. A. Mo.); *In re Wilke,* 42 Fed. Supp. 1021 (D. C. Pa.); *In re Boehme,* 41 Fed. Supp. 426 (D. C. Mont.); *Federal Farm Mort. Corp. v. Davis,* 132 F. (2d) 501 (C. C. A. Calif.); *Fallbrook Public Utility Dist. v. Cowan,* 131 F. (2d) (C. C. A. Calif.), cert. den. 320 U. S. 735; *In re Chrisman,* 35 Fed. Supp. 282 (D. C. Calif).

The sole interest of the appellees in the property was only the limited right to live on the land and to receive certain commissions from its sale.

In fact under the circumstances even the interest of the *corporation* may be deemed to be no more than personal property.

> *Wright v. Sec. First Nat. Bk.,* 35 Cal. App. (2d) 264; *Ward v. Waterman,* 85 Cal. 488; *Craven v. Domingues Estate Co.,* 72 Cal. App. 713; *Finnie v. Smith,* 83 Cal. App. 707; *Houghton v. Pac. etc. Bank,* 111 Cal. App. 509; *Smith v. Bank of America,* 14 Cal. App. (2d) 78; and *Bank of America v. Sparr Realty,* 20 Cal. App. (2d) 10.

It is, therefore, respectfully submitted that in the light of the foregoing authorities the *appellees,* as distinguished from the corporation, have no sufficient interest in the property to maintain the within proceedings under Section 75.

> *In re Tracy,* 80 F. (2d) 9; *U. S. Natl. Bank v. Pamp,* 83 F. (2d) 493; *In re Nossman,* 22 Fed. Supp. 645; *In re Hageman,* 10 Fed. Supp. 716; *Bastian v. Erikson,* 114 F. (2d) 338.

This issue was first placed before the court on the petition for review from the order of the Conciliation-Commissioner of August 1, 1944. It is a different proposition from whether or not the appellees were farmers as such, which issue was previously before the court.

The determination that the appellees were farmers does not necessarily mean that the appellees had a sufficient interest in the property to maintain the within proceedings. And it is submitted that in the light of the foregoing authorities the appellees have no such interest in the property and that the instant proceedings should be dismissed.

POINT VI.

The Determination of the Validity and Amount of Appellants' Secured Claim, Including Interest Up to December 9, 1942, Is a Matter of Right and Not a Matter of Judicial Discretion.

A. Even if the Allowance of Interest Up to December 9, 1942, Herein be a Matter of Judicial Discretion, There Was an Abuse of Such Discretion by the Failure to Allow Interest in Accordance With the Provisions of the Obligation From Its Inception to December 9, 1942.

It appears conceded by the District Court in its opinion herein that if the declaration of trust was not barred by the statute of limitations on December 9, 1942, interest will be allowed from the inception of the obligation to that date as a matter of right. The opinion of the District Court states:

> ". . . and the weight of the authority is that where the rate of interest is specified in the note, that rate continues after maturity and until paid.
>
> "Thus in the case at bar, where the language of the note specifically provides for interest 'until paid' it would seem that the contract rate of interest would be applicable after maturity." [Tr. pp. 63-64.]

It is only where the obligation has been barred by the statute of limitations that the amount of principal and interest which appellees must pay to remove the lien on their property rests within the sound discretion of the Court. [Tr. p. 62.]

Section 75-k of the Bankruptcy Act imposes certain limitations in respect to farmer-composition proposals and provides that such composition or extension shall not reduce the amount of or impair the lien of any secured creditor below the fair market value of the property securing any such lien at the time of acceptance although future rates of interest may be reduced.

Thus even where the farmer can persuade a sufficient number of his creditors to approve a composition proposal he may not impair the lien of a secured creditor below the limit stated above.

If the decision of the District Court be affirmed, the lien of the appellant will be impaired below the limit stated above. For, as stated in Point II above, the reasonable market value of the cash and real estate securing the lien of the appellant is in excess of $129,000 and the total lien claim of the appellant as of September 1, 1947, is only $77,591.51.

Furthermore we have demonstrated in Point I under the authority of *Vanston Protective Bondholders Committee v. Breen, supra,* and cases there cited, that the determination of the validity and amount of a claim in the absence of controlling federal law was determined by state law. And we submit that we have demonstrated that under California law the claim of the appellant requires the allowance of interest from the inception of the obligation at least until December 9, 1942.

A.

Even if the allowance of interest up to December 9, 1942, herein be a matter of judicial discretion, there was an abuse of such discretion by the failure to allow interest in accordance with the provisions of the obligation from its inception to December 9, 1942.

The order of the Conciliation-Commissioner affirmed by the District Court allows interest as provided in the note up to the date of maturity of the note, and simple interest at the rate of 7% per annum for four years thereafter, to-wit: until July 30, 1936, *and no interest thereafter.* Thus if this Court affirms the judgment of the District Court, it is depriving the appellant of any interest for consideration for the use of its money ($33,834.23 according to the District Court) *for more than eleven years.* It is permitting the appellees to have the free use of that money for said entire period.

We respectfully submit that this is extremely unequitable and contrary to the spirit and purpose of Section 75 of the Bankruptcy Act. (See Sec. 75-i.)

The inequity of this situation is particularly aggrevated in view of the fact that appellant is the sole creditor of appellees.

The inequity of the disallowance of interest is more apparent when it is considered that since November 4, 1940, to and including the present time the appellees have by the prior State Court action and the instant proceedings prevented the appellant from causing said property to be sold to satisfy its lien.

Furthermore, in view of the admissions in the aforesaid pleadings in the State Court action, and particularly in

view of the offer of the appellees in their composition proposal of April 2, 1943, to recognize and pay the principal indebtedness in the sum of $50,000 as of August 1, 1947, together with interest thereon at the rate of 4% per annum from August 1, 1944, it appears highly inequitable to permit them to pay less to clear their property of the lien of the appellant than they voluntarily offered in equity and good conscience to pay in their said proposal.

It is, therefore, respectfully submitted that even if the allowance of interest on the claim of the appellant up to December 9, 1942, be deemed a matter of judicial discretion that, nevertheless, "to do equity" appellees should be required to pay interest on the obligation at least up to and including December 9, 1942. To allow less, we submit, was at least an abuse of discretion, if not the impairment of a substantive right.

Respectfully submitted,

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